

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

GREGORY R. SMITH,
Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondant.

MEMORANDUM DECISION AND
ORDER DENYING CERTIFICATE
OF APPEALABILITY

Case No. 2:09-CV- 44 TS
Criminal Case No. 2:07-CR-446 TS

Petitioner moves for a certificate of appealability. Because this Court denied his Motion under 28 U.S.C. § 2255, Petitioner may not appeal without a certificate of appealability. Such a certificate may issue “only if the applicant has made a substantial showing of the denial of a constitutional right.”¹ “To make the requisite showing, [the petitioner] must ‘show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues

¹See 28 U.S.C. § 2253(c)(2).

presented were adequate to deserve encouragement to proceed further.”² Petitioner has not made such a showing.

Petitioner argues the Court erred as follows: (1) by finding his claim of ineffective assistance of counsel based on an error in calculating a guideline range was barred by collateral rights waiver in his plea agreement; (2) by finding that *Apprendi*-type issues could be waived; (3) in following controlling case law construing the term “statutory maximum”; and (4) in failing to follow the allegedly controlling precedent of *Glover v. United States*.³

For the reasons stated in the Court’s Order Denying the § 2255 Motion, the Court finds reasons one through three do not “show that reasonable jurists could debate whether the petition should have been resolved in a different manner” not do they show “that the issues presented were adequate to deserve encouragement to proceed further.” As to the fourth reason, the Court notes that *Glover* did not involve a waiver of collateral rights or the claim of ineffective assistance of counsel in connection with a plea agreement. Therefore, it was not controlling case law. Petitioner has not made a substantial showing of the denial of a constitutional right. Accordingly, it is therefore

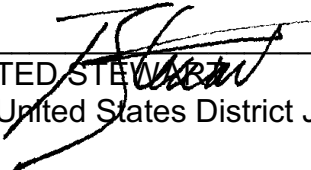
²*United States v. Klingensmith*, 2009 WL 1970114, 1 (10th Cir. July 9, 2009) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003)) (alterations and omissions in *Klingensmith*).

³531 U.S. 198 (2001)

ORDERED that Petitioner's Motion for a Certificate of Appealability (Docket No. 12) is DENIED.

DATED July 13, 2009.

BY THE COURT:



TED STEWART
United States District Judge